No. 79-880

Supreme Court, U.S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, *et al.*,

Petitioners,

—v.—

MORTON HALPERIN, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF HEDRICK AND ANN B. SMITH, individually and on behalf of their minor children, AMICI CURIAE

LEON FRIEDMAN
Hofstra University School of Law
Hempstead, N.Y. 11550

FLOYD ABRAMS
GERALD J. BROWN
CAHILL GORDON & REINDEL
80 Pine Street
New York, N.Y. 10005

JAMES C. GOODALE
DEBEVOISE, PLIMPTON, LYONS & GATES
299 Park Avenue
New York, N.Y. 10022

KATHARINE P. DARROW
BRENDA BAKER
THE NEW YORK TIMES
229 West 43rd Street
New York, N.Y. 10036

Attorneys for Amici

TABLE OF CONTENTS

PAGE

Interest of Amici 1

Statement of the Case 3

Introduction and Summary of Argument 13

Argument

THE PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW SINCE THE NATIONAL SECURITY JUSTIFICATION URGED BY THEM HAS NO BASIS ON THE RECORD 14

A. The Good Faith Defense Cannot Be Established as a Matter of Law 15

1. Subjective Good Faith 15

2. Objective Good Faith 18

B. The Petitioner's Conduct Violated Important and Well-Established First Amendment Rights 22

C. The Wiretap Program Was Illegal Because of the Surveillance of Working Journalists 23

Conclusion 29

TABLE OF AUTHORITIES

Cases:	PAGE
Alderman v. *United States*, 394 U.S. 165 (1969)	20
Baker v. *F&F Investment*, 470 F.2d 228 (2d Cir. 1972)	28
Baker v. *McCollan*, 443 U.S. 137 (1979)	15
Bates v. *Little Rock*, 361 U.S. 516 (1960)	14, 23
Berger v. *New York*, 388 U.S. 4 (1967)	19, 21
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	22
Branzburg v. *Hayes*, 408 U.S. 665 (1972)	14, 24
Butz v. *Economou*, 438 U.S. 478 (1978)	15
Garland v. *Torre*, 259 F.2d 545, 549 (2d Cir. 1958)	27
Gibson v. *Florida Legislative Comm.*, 372 U.S. 539 (1963)	23
Gomez v. *Toledo*, 100 S.Ct. 1920 (1980)	16
Houchins v. *KQED, Inc.*, 438 U.S. 1 (1978)	27
In re Roche, 49 U.S.L.W. 3017	24
Katz v. *United States*, 389 U.S. 347 (1967)	19, 20, 21
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 (1958)	23
Procunier v. *Navarette*, 434 U.S. 555 (1978)	15, 16
Reporter's Committee for Freedom of the Press v. *AT&T*, 593 F.2d 1030 (1978), cert. denied, 440 U.S. 949 (1979)	24, 25
Riley v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979)	28
Saxbe v. *Washington Post*, 417 U.S. 843 (1974)	24

PAGE

Shelton v. *Tucker*, 364 U.S. 479, 485-86 (1960) 14, 22

Smith v. *Nixon*, 449 F.Supp. 324 (D.D.C. 1978). 2

Smith v. *Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), *petition for cert. filed* 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-882) 1, 2, 13, 18, 22, 23, 24, 27

United States v. *Abel*, 362 U.S. 217 (1960) 20

United States v. *Ehrlichman*, 376 F.Supp. 29 (D.D.C. 1974), aff'd 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977) 27

United States v. *Cuthbertson*, 6 Med. L. Rptr. 1545 (3d Cir. 1980) 28

United States v. *United States District Court*, 407 U.S. 297 (1972) 13, 14, 15, 18, 21, 22

Walker Process Equip. Inc. v. *Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965) 28

Wood v. *Strickland*, 420 U.S. 308 (1972) 14, 15, 17

Zurcher v. *Stanford Daily*, 436 U.S. 547 (1978).....24, 25

Statutes:

28 C.F.R. § 50.10 25

18 U.S.C. § 2511(3) 26

18 U.S.C. § 2520 2

Other Authorities:

Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Committee on Foreign Relations, 93rd Cong., 2d Sess. (1974) 4

PAGE

Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) 4, 5, 6, 7, 8, 16, 26, 28

L. Friedman, "The Good Faith Defense in Constitutional Litigation," 5 *Hofstra L. Rev.* 501 (1977) 18

House Impeachment Report H.R. Rep. No. 93-1305, 93rd Cong., 2d Sess. 146-150 (1974) 4, 8, 9

Statement of Information, Committee on the Judiciary of the House of Representatives, 93rd Cong., 2d Sess. (1974) 4, 9, 10, 16

No. 79-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, *et al.*,

Petitioners,

—v.—

MORTON HALPERIN, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF HEDRICK AND ANN B. SMITH, individually and on behalf of their minor children, AMICI CURIAE

INTEREST OF AMICI*

Amici Hedrick Smith, a Pulitzer-prize winning journalist working for the New York Times, his wife Ann and their three minor children, were victims of the same wiretap as that involved in the instant case; see *Smith* v. *Nixon,* 606 F.2d 1183 (D.C. Cir. 1979) *petition for cert. filed* 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-882). The defendants in both cases are almost identical—Nixon, Mitchell, Kissinger, Haldeman, Ehrlichman and Sullivan were sued in both cases for almost precisely the same acts.[1] Like

* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

1 Haig was named as a defendant only in *Halperin* and de Loach was named only in *Smith.*

the Halperin family, the Smith's home private telephone was wiretapped for a considerable period of time despite the lack of any judicial warrant. Like the Halperin wiretap, the national security justification was extremely doubtful and the extent of the surveillance and the lack of probable cause or minimization made the tap presumptively unreasonable under the Fourth Amendment.

In addition, Mr. Smith was a working journalist and his selection as a target was even more questionable than that of a government employee since the effect of such a wiretap would be to implicate confidential source relationships.

In May 1976, the Smith family brought an action under 18 U.S.C. § 2520 and the Fourth Amendment. Before any discovery was permitted, the district court dismissed the action on the ground, *inter alia,* that the wiretap was not unlawful because the Justice Department had not violated its own regulations in installing the wiretap, *Smith* v. *Nixon,* 449 F.Supp. 324 (D.D.C. 1978). The Court of Appeals reversed, holding that it was not established that the wiretap was a valid national security operation, noting that "Smith did not satisfy the three criteria established by the Nixon Administration for identifying surveillance subjects." 606 F.2d at 1188. It also wrote that "courts may not simply accept bland assurances by the Executive that a situation did, in fact, represent a national security problem requiring surveillance." *Ibid.* It ordered a remand to the district court for discovery and a trial on whether valid national security considerations were in fact involved and whether the Fourth Amendment reasonableness requirements were met.

A petition for certiorari was filed in *Nixon* v. *Smith* simultaneously with that in the present action. This Court has acted only on the *Kissinger* petition and has not taken any action in *Nixon* v. *Smith.* The identical legal questions have been presented to this Court for review in both cases. Under those circumstances, it is obvious that this Court's determination of those issues in *Kissinger* will be crucial for the determination of the *Nixon* appeal. Thus if this Court accepts the government's arguments that the defendants in the *Kissinger* case are entitled to qualified

immunity as a matter of law, that holding would seriously affect the position of the Smith respondents as well. Therefore, the Smiths are vitally interested in presenting their point of view on the legal issues now before the Court and submit this amicus brief accordingly.

STATEMENT OF THE CASE

The petitioners seek to characterize the wiretap program at issue here as a pure and unblemished national security investigation. It describes the motivation of the participants as a concern "about unauthorized disclosures to the press of certain foreign policy documents and classified information." (Petitioner's Brief at 1).

Because of these leaks, petitioners claim President Nixon, Mitchell and Kissinger and former FBI director, J. Edgar Hoover met in April, 1969 to discuss breaches of security. After director Hoover had told everyone that wiretaps had been used previously in national security investigations, President Nixon authorized the program and established certain criteria for selecting targets. These criteria included (a) access to the information; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of information. (I J.A. 326)

Following what was considered a major leak of information on the bombing of Cambodia, a wiretap was installed on Morton Halperin and three other individuals. Over the next two years, following other alleged leaks, the program was extended to a total of 17 persons, 4 of whom, including Hedrick Smith, were working journalists. The wiretaps were installed for different periods on different individuals, but the one on Morton Halperin remained for the full period of May 9, 1969 to February 10, 1971, even though he had left the National Security Council in September 1969 and resigned as a consultant in May 1970. The petitioners justify the 21 month wiretap in the following way: "Because the continuing surveillance failed to reveal that Halperin was the source of the leak, the wiretap was removed from the phone on February 10, 1976." Petitioners Brief at 6.

Although the petitioners urge that a legitimate national security wiretap was in operation, that position was rejected by the courts below and by independent inquiries conducted by Congress. Three separate Congressional committees investigated the wiretap program.[2] The Senate Foreign Relations Committee Study focused only on Dr. Kissinger's role and explicitly avoided making a judgment on the program as a whole.[3] However, the other two Congressional studies rejected the "bland assurances" of the petitioners—repeated here once again—that only national security considerations were behind the instigation and conduct of the wiretap program.

Thus the Church Committee Final Report described the scope of the program:

> On May 12, a formal request was sent by the Director to Attorney General Mitchell for wiretaps on all four individuals (one of which had been in operation for three days); Mitchell approved; and the additional taps were subsequently instituted.
>
> Over the course of the next one and one-half years, thirteen more individuals became the subjects of wiretaps in this same program. Bureau documents reflects the following authorizations from Attorney General Mitchell:
>
> —May 20, 1969: Two members of the staff of the National Security Council
>
> —May 29, 1969: A reporter for the *London Sunday Times*

---

2 See *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities,* S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) (Church Committee); *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations,* 93rd Cong., 2d Sess. (1974); *Statement of Information, Committee on the Judiciary of the House of Representatives,* 93rd Cong., 2d Sess. (1974); H.R. Rep. No. 93-1305, 93rd Cong., 2d Sess. 146-150 (1974) (Judiciary Committee report on evidence from impeachment inquiry into wiretap program) ("House Impeachment Report").

3 See *Dr. Kissinger's Role in Wiretapping,* viii.

—June 4, 1969: A reporter for the *New York Times*

—July 23, 1969: A White House domestic affairs adviser

—August 4, 1969: A White House speech writer

—September 10, 1969: A correspondent for CBS News

—May 4, 1970: A Deputy Assistant Secretary of State; a State Department official of "Ambassador" rank; and a Brigadier General with the Defense Department

—May 13, 1970: Two additional staff members of the National Security Council

—December 14, 1970: A second White House domestic affairs adviser.

The longest of these wiretaps was the one on Halperin: it continued for twenty-one months, until February 10, 1971, and was apparently terminated at the insistence of Director Hoover, who was about to testify before the House Appropriations Committee. Other wiretaps lasted for periods of time varying from six weeks to twenty months.

"Warrantless FBI Electronic Surveillance," Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans, Church Committee, Final Report, Book III, 326.

The Church Committee Final Report made the following judgment about the program:

The "17" Wiretaps. The relative ease with which high administration officials could select improper intelligence targets was demonstrated by the "17" wiretaps on Executive officials and newsmen installed between 1969-1971 under the rationale of determining the source of leaks of sensitive information. In three cases no national security claim was even advanced. While national security issues were at least arguably involved in the initiation of the other taps, the program continued in two instances against persons who left the government and took positions as advisors to

Senator Edmund Muskie, then the leading Democratic Presidential prospect.

The records of these wiretaps were kept separate from the FBI's regular electronic surveillance files; their duration in many cases went beyond the period then required for re-authorization by the Attorney General; and in some cases the Attorney General did not authorize the tap until after it had begun. In 1971, the records were removed from the FBI's possession and sent to the White House.

Final Report, Book II, 122

The Church Committee based this conclusion on the wide scope of the program, the lack of proper standards and evidence of political motivation for obtaining, and later misusing, the information generated by the wiretap:

(iv) The "17" Wiretaps.

The Nixon White House learned a substantial amount of purely political intelligence from wiretaps to investigate "leaks" of classified information placed on three newsmen and fourteen executive officials during 1969-1971. The following illustrate the range of data supplied:

One of the targets "recently stated that he was to spend an hour with Senator Kennedy's Vietnam man, as Senator Kennedy is giving a speech on the 15th."

Another target said that Senator Fulbright postponed congressional hearings on Vietnam because he did not believe they would be popular at that time.

* * * * *

One of the targets told a friend it "is clear the Administration will win on the ABM by a two-vote margin. He said 'They've got [a Senator] and they've got [another Senator].'."

* * * * *

A friend of one of the targets described a Senator as "marginal" on the Cooper-Church Amendment and

> stated that another Senator might be persuaded to support it.
>
> * * * * *
>
> There is at least one clear example of the political use of such information. After the FBI Director informed the White House that former Secretary of Defense Clark Clifford planned to write a magazine article criticizing President Nixon's Vietnam policy, White House aide Jeb Stuart Magruder advised John Ehrlichman and H. R. Haldeman that "we are in a position to counteract this article in any number of ways." It is also significant that, after May 1970, the FBI Director's letters summarizing the results of the wiretaps were no longer sent to Henry Kissinger, the President's national security advisor, but to the President's political advisor, H. R. Haldeman.
>
> *Ibid.* at 235-37

The Church Committee Final Report emphasized the sweeping nature of the program:

> The so-called "seventeen" wiretaps on journalists and government employees, which collectively lasted from May 1969 to February 1971, also illustrate the intrusiveness of electronic surveillance. According to former President Nixon, these taps produced "just gobs of material: gossip and bull." FBI summaries of information obtained from the wiretaps and disseminated to the White House, suggest that the former President's private evaluation of them was correct. This wiretapping program did not reveal the source of any leaks of classified data, which was its ostensible purpose, but it did generate a wealth of information about the personal lives of the targets—their social contacts, their vacation plans, their employment satisfactions and dissatisfaction, their marital problems, their drinking habits, and even their sex lives.
>
> Among those who were incidentally overheard on one of these wiretaps was a currently sitting Associate Justice of the Supreme Court of the United States, who made plans to review a manuscript written by one of the targets. Vast

amounts of political information were also obtained from these wiretaps.

The "seventeen" wiretaps also exemplify the particularly acute problems of wiretapping when the targeted individuals are involved in the domestic political process. These wiretaps produced vast amounts of purely political information, much of which was obtained from the home telephones of two consultants to Senator Edmund Muskie and other Democratic politicians.

Ibid. at 200

The House Judiciary Committee in its impeachment report made similar judgments about the program. The Committee voted explicitly to recommend impeachment of President Nixon because of his involvement in the program:

ARTICLE II

Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

This conduct has included one or more of the following:

* * * * *

(2) He misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel, in violation or disregard of the constitutional rights of citizens, by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national

> security, the enforcement of laws, or any other lawful function of his office; he did direct, authorize, or permit the use of information obtained thereby for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and he did direct the concealment of certain records made by the Federal Bureau of Investigation of electronic surveillance.
>
> House Impeachment Report, 3

The House Judiciary Committee's judgment on the program was almost precisely the same as that of the Church committee. It described the scope of the program in the following words:

> One of the five NSC employees whose telephones were tapped was Morton Halperin (designated "N" in the Committee's statement of information). The wiretap of Halperin's telephone was installed on May 9, 1969. (Memorandum from Director, FBI to Attorney General, June 24, 1974; letter from Deputy Attorney General Silberman to Senator J. W. Fulbright, June 18, 1974) On July 8, 1969, Assistant FBI Director William Sullivan, who had day-to-day responsibility for the wiretaps, reported to Hoover that "nothing" of significance from the standpoint of the leak in question "has come to light" from the Halperin tap. Sullivan told Hoover that he had suggested Colonel Haig that some of this coverage be removed. (Book VII, 326) The Halperin wiretap, however, remained in place.
>
> *Ibid.* at 146-147

It concluded as to President Nixon's role:

> Evidence before the Committee shows, . . . that some of the taps were not legal, that they did not concern national security, but that they were installed for political purposes, in the President's interest and on his behalf. The President also privately admitted that the taps were very unproductive and were useless in determining the source of leaks.
>
> *Ibid.* at 150

The Judiciary Committee also concluded that those responsible for the program behaved as if they knew they were acting improperly because of the manner in which the records of the program were maintained:

> CONCEALMENT OF RECORDS OF THE 1969-1971 FBI WIRETAPS
>
> In conducting wiretaps, the FBI maintains a central file and indices of records of the taps so that the names of persons overheard are retrievable if production should be required during a criminal prosecution. The FBI was expressly ordered by Haig not to maintain records of the wiretaps initiated under the President's 1969 authorization, and was told that it would be desirable to have the matter handled without going to the Department of Justice. (Book VII, 189) The FBI nevertheless maintained unindexed logs and records of these taps and kept them in the office of Assistant Director William Sullivan. (Book VII, 182-83, 186)
>
> *Ibid.* 152-153

Eventually William C. Sullivan told Robert Mardian, Assistant Attorney General in charge of the Internal Security Division that he had the records in his possession.

> Mardian sought advice from Attorney General Mitchell and then, on July 11, 1971, was contacted by either Haldeman or Ehrlichman, who instructed him to fly to San Clemente to discuss the matter with the President. (Book VII, 758, 767) John Ehrlichman's notes of a July 10 meeting with the President include: "Re: Grand Jury—Don't worry re taps on discover—re WHs." Mardian arrived in San Clemente on July 11, 1971, and met with the President and Ehrlichman the next day. (Book VII, 806) The President directed Mardian to obtain the logs and files from Sullivan, to deliver them to the White House, and check with Kissinger, Haig and Haldeman to make sure all reports sent to them were accounted for.
>
> *Ibid.* at 153

Thus, two Congressional committees which investigated the program in detail judged that it was far from the properly initiated and carefully conducted national security program which the petitioners now urge on the Court. This was true because those responsible for creating and operating the program as a whole

1 selected as targets individuals such as Smith who could not possibly have been responsible for the leaking of national security information;

2 selected as target individuals such as Smith who did not meet the criteria established by President Nixon for inclusion in the program;

3 continued the wiretap on persons long after they left the government and were not in a position to obtain any national security information;

4 made no effort to minimize or screen out information obtained from the wiretaps unrelated to national security;

5 affirmatively sought out and passed on personal and political information about the targets to the White House;

6 violated the Justice Department's own regulations on national security wiretaps by (a) installing some without any written approval by the Attorney General; (b) not presenting reasons to the Attorney General to justify the wiretaps; (c) not putting any time limitations on the wiretaps; (d) not obtaining additional written authorization from the Attorney General for wiretaps that extended over 90 days; (e) not preserving the tapes of the wiretaps;

7 continued the program despite complaints by the FBI officials conducting it that it was fruitless;

8 did not maintain the records of the wiretaps in the regular FBI files and later secreted them in the White House after telling Director Hoover that they had been destroyed.

But even if the program as a whole began as a valid national security operation, that would still not resolve the claims of individual victims that they should not have been selected as targets and that the program was conducted unreasonably as to them. When one examines the individual wiretap on Halperin, the "bland assurances" of the government that national security was involved cannot be justified. As more fully explained in the Respondent's Brief,

1 the motivation for the wiretaps on Halperin appeared to be grounded in political complaints of leading Republican legislators that Halperin was a hold-over Democrat of questionable *political* loyalty. (see I J.A. 167-169)

2 Halperin did not have access to the key information on the Cambodian bombing published on May 9, 1969; (see I J.A. 214)

3 his access to other national security information was curtailed because he was suspected as a leaker; (I J.A. 214-216; II J.A. 229)

4 Halperin was considered a "prime suspect," by Hoover—who knew little if anything about access to the information involved—because he was an "arrogant Harvard-type Kennedy" man. (I J.A. 174)

5 the FBI recommended that the Halperin tap be taken off since it was not productive, but it was maintained for the full period of 21 months (I J.A. 184)

6 Halperin left the employ of the NSC on September 19, 1969 and became a consultant until May 1970 when he resigned; he had no access to classified information during this period and worked only one day for the NSC (I J.A. 216);

7 After May 1970 Halperin had no relationship of any kind with the NSC but the tap was maintained for an additional nine months;

8 Only 28% of the wiretaps overheard and logged by the FBI were between Halperin and persons outside the

family; on the other hand 27% were between Halperin and his wife. (606 F.2d at 1198, n.33)

9 The FBI passed on considerable political information, such as "planned publication criticizing the nation's Vietnam policy and congressional lobbying on war-related legislation, and political campaign plans, including potential opposition to President Nixon in 1972." 606 F.2d at 1198.

Based on these facts, the wiretap on Halperin takes on a totally different picture than that presented by the government.

INTRODUCTION AND SUMMARY OF ARGUMENT

This amicus brief is primarily directed to the second and third questions presented by the government, namely: (2) whether "[the petitioners] are entitled to a qualified immunity as a matter of law for authorizing electronic surveillance prior to this Court's decision in *United States* v. *United States District Court* (Keith), 407 U.S. 297 (1972)," and (3) "whether [that decision] . . . should be applied retroactively to create personal damage liability for federal officers."

It is the position of amici that the answer to the second question is no and that the third question has no meaning in this case. The *Keith* case established that a warrantless wiretap in domestic national security cases violated the Fourth Amendment. The alleged "uncertain state of the law" with respect to judicial warrants in national security cases becomes irrelevant when the challenged wiretap was not a true national security surveillance. Nor does the issue of a warrant become important when many other requirements of the Fourth Amendment have been violated.

The petitioners cannot show that they acted in subjective good faith as a matter of law. The undisputed record below shows that the wiretap was conducted for purposes unrelated to its original justification. The use of the wiretap for political reasons undercuts any possible claim of subjective good faith.

In addition, the objective part of the good faith test has not been proved by the petitioners. Regardless of the need for a warrant the wiretap at issue here violated the "reasonableness" requirement of the Fourth Amendment. There was no probable cause shown for the initiation for the wiretap, it was not limited in scope or in time, nor was it reviewed periodically to insure compliance with the original justification.

In addition, the wiretap violated important and well established First Amendment rights of the respondents. The petitioners intercepted private political conversations and used and disclosed the private political associational activities discovered by them through the wiretap. This governmental intrusion violated the First Amendment. *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); *Bates* v. *Little Rock,* 361 U.S. 516 (1960).

Furthermore, the wiretap was installed on working journalists. This had the effect of the government intruding into and discovering all of the journalists' confidential sources. Such an intrusion without any showing of a compelling governmental need is a serious invasion of the journalists' First Amendment rights. See *Branzburg* v. *Hayes,* 408 U.S. 665 (1972).

ARGUMENT

THE PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW SINCE THE NATIONAL SECURITY JUSTIFICATION URGED BY THEM HAS NO BASIS IN THE RECORD

The petitioners argument on qualified immunity is based on a leaky syllogism. The steps of the argument are as follows:

1. The *Keith* case established that warrantless wiretaps were illegal in domestic national cases.
2. The state of the law before that time was uncertain with respect to warrantless domestic national security wiretaps.
3. The petitioners are therefore entitled to qualified immunity under *Wood* v. *Strickland,* 420 U.S. 308 (1972) and

Butz v. *Economou,* 438 U.S. 478 (1978) since the right to be free of a warrantless wiretap in such instances was not clearly established before the *Keith* case.

The key fallacy in the argument is the assumption that a true national security wiretap was at issue here. If the wiretaps were conducted in bad faith for purposes of political espionage, the date of the *Keith* case has no legal significance. There surely was no "uncertain state of the law" on the legality of using a warrantless wiretap to spy on political opponents or to wiretap journalists whose writing displeased the administration.

Furthermore the *Keith* case dealt only with the need for a *warrant.* It added nothing to the existing Fourth Amendment law on the need for probable cause, particularity of the description of the thing to be seized, limited surveillance in terms of scope and time and the need for periodic review. See *Katz* v. *United States,* 389 U.S. 347 (1967) and *Berger* v. *New York,* 388 U.S. 41 (1967). Thus on either subjective or objective grounds, the petitioners' good faith defense cannot be established as a matter of law.

A. The Good Faith Defense Cannot be Established as a Matter of Law

1. Subjective Good Faith

The petitioners cite this Court's decisions in *Wood* v. *Strickland, supra,* and *Butz* v. *Economou, supra* for the proposition that "in the absence of some showing of malice, an official would not be held liable in damages . . . unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." 438 U.S. at 498. *See also, Procunier* v. *Navarette,* 434 U.S. 555 (1978); *Baker* v. *McCollan,* 443 U.S. 137 (1979).

The good faith defense thus has both a subjective and an objective component. The official must "be acting sincerely and with a belief that he is doing right." *Wood* v. *Strickland,* 420 U.S. at 321. He must not be acting "with malicious intention to cause a deprivation of constitutional rights or other injury." *Ibid.* at 322. If he does act in subjective bad faith, he will be held liable no

matter how uncertain the state of the law was at the time. This is the result of the decision in *Procunier* v. *Navarette,* 434 U.S. 555 (1978) where this Court examined both the state of the law with respect to prisoner mail at the time the acts at issue occurred, and second, the alleged state of mind of the government officials sued. If the unsettled state of the law was sufficient to establish a good faith defense it would not have been necessary to examine state of mind as well. Thus both parts of the test must be met by the defendant officials—who have the burden of proof on that score, see *Gomez* v. *Toledo,* 100 S.Ct. 1920 (1980).

In the instant case, the petitioners have not established either part of the defense. The district court specifically found that three of them—Nixon, Mitchell and Haldeman—had acted in subjective bad faith:

> From this factual base, the liability and responsibility of certain defendants emerges: former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; H.R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification.
>
> . . . .
>
> As for any contention of subjective good faith, the undisputed record in this case controverts such a defense . . .
>
> 424 F. Supp. at 845.

That finding is fully supported by the numerous overreachings and excesses cited in the statement of the case and described so extensively by the Church Committee and the House Judiciary Committee. Since the petitioners have not shown and cannot show their subjective good faith as a matter of law—indeed the record is precisely the opposite—they cannot prevail on their good faith argument regardless of the state of the law at

the time they acted. The case must be remanded, as the Court of Appeals determined, for fuller hearings.[4]

The petitioners dispute the finding of subjective bad faith made by the District Court and referred to by the Court of Appeals. They argue that since the District Court did not award punitive damages it could not have found that the petitioners "acted in bad faith." (Petitioner's Brief at 60). In other words petitioners suggest that only a finding of sufficient malice to warrant an award of punitive damages can justify a finding of bad faith. That is simply not the law. As this Court noted in *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975), a *"compensatory award* will be appropriate only if the school board member has acted with such an impermissible motivation . . . that his action cannot reasonably be characterized as being in good faith." (emphasis added).

The petitioners have noted that there is a difference between a finding of malice for the purpose of awarding punitive damages and a finding of subjective bad faith. In footnote 59 of their brief (at p. 60) they admit that "the standards of malicious intent for punitive damages and for qualified immunity are not necessarily identical." Nevertheless they argue that it is "unlikely" that the district court would have denied punitive damages if it had found that "petitioners acted in bad faith and with a malicious intent." But this argument is simply a reassertion of the argument that "malice", "bad faith" and "lack of subjective good faith" are equivalent concepts. They are not, as the District Court explicitly found in this case.

---

4 In this regard the Smith amici are in a slightly different position than the Halperin respondents. There was no determination in the Smith case of either the absence or presence of subjective bad faith. Since the Smith case was originally disposed of on a motion to dismiss, there was no discovery, no factual submissions on this point, not even an answer. There were however allegations of bad faith in the complaint which was fully supported by the detailed studies made by the Congressional committees cited above. Since Hedrick Smith was a working journalist when his home telephone was wiretapped, the lack of any subjective good faith becomes an even more compelling conclusion, as explained below. In any event, a finding of subjective good faith as a matter of law based on the *Smith* record is simply impossible at this stage of the proceedings.

2. Objective Good Faith

Even if the subjective part of the test is met, the official's belief in the legality of what he is doing must be reasonable. This objective part of the test focuses not on the individual actor's own motivation, but on the state of the law at the time. See generally L. Friedman, "The Good Faith Defense in Constitutional Litigation," 5 *Hofstra L. Rev.* 501 (1977).

The objective good faith defense cannot be established as a matter of law on this record. As noted above the petitioner's entire argument is premised on the assumption that a legitimate national security wiretap was installed and in operation and that the state of the law on such wiretaps was unclear until the *Keith* case had been decided in 1972. However, the factual record in this regard does not support the position that such a legitimate wiretap was involved. The Court of Appeals specifically remanded this case and *Smith* v. *Nixon* for further factual development on this score. It required the parties to present evidence on their contention that national security considerations were or were not the "primary purpose" of the wiretap: "On remand the District Court must address all of these contentions. Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities. Where the parties have posed genuine issues of material fact, the court will have to undertake an evidentiary inquiry."[5] 606 F.2d at 1205.

Rather than undertake such a test of their assertions, petitioners argue here that whatever they say is national security is national security and that the courts are bound by that assertion. This Court has never accepted such "bland assurances" previously, nor should it do so now. See *Keith, supra.*

In addition, the "state of the law" on the Fourth Amendment reasonableness requirements—as opposed to the need for a

---

5 In *Nixon v. Smith, supra,* there was no discovery or evidentiary development of any of the underlying facts as to the wiretap on Hedrick Smith and his family. Thus full evidentiary hearings would be necessary.

warrant—was perfectly clear in 1969. In *Berger* v. *New York*, 388 U.S. 41 (1967), this Court, in holding a New York wiretap statute unconstitutional, emphasized the importance of the particularization requirements of the Fourth Amendment because "[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope." *Id.* at 56. This Court went on to spell out the procedures necessary to permit a wiretap to meet Fourth Amendment standards:

a The surveillance must be based on probable cause and must specify with particularity the communciations to be seized. *Id.* at 59.

b The surveillance must be limited in scope. It cannot permit the seizing of all communications of all persons using the telephone regardless of their relation to the purpose of the surveillance. *Id.*

c The surveillance must be limited in time. "[A]uthorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause." *Id.*

d There must be periodic renewals based on a new showing of probable cause. *Id.*

This Court in *Katz v. United States,* 389 U.S. 347 (1967) further held that wiretaps are covered by the Fourth Amendment. After noting that the Fourth Amendment protects "people—and not simply 'areas'," the Court declared that:

> "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.

It specifically held that a warrant must be obtained before such a "search and seizure" occurs. At the end of its opinion this Court for the first time suggested that the Fourth Amendment

might be applied somewhat differently "in a situation involving the national security." *Cf. United States* v. *Abel,* 362 U.S. 217 (1960). However, it reserved judgment only on the question of whether a warrant from a magistrate was necessary,[6] indicating that the safeguards required by the Fourth Amendment other than the warrant were fully applicable to national security cases.

Furthermore, this exception, if it existed, was quite limited in nature. Mr. Justice White in his concurrence in *Katz* described the footnote as an "acknowledgment that there are circumstances in which it is reasonable to search without a warrant" and said such circumstances, in his view, included "national security cases." 389 U.S. at 363. Justices Douglas and Brennan, in attacking the suggestion that such an exception existed, proclaimed that "spies and sabotuers are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner." 389 U.S. at 360.

In *Alderman* v. *United States,* 394 U.S. 165 (1969) both Justice Fortas and Harlan thought there might be an exception to the rule there announced in national security cases but both recognized that the category involved would be limited to situations involving espionage or sabotage. See 394 U.S. at 199, 209.

Thus, it was "settled indisputable law" in May 1969 as determined by Supreme Court precedents that:

1. All wiretaps had to be conducted in accordance with the Fourth Amendment.

2. All wiretaps—even if justified on national security grounds—had to be "reasonable" to satisfy the Fourth Amendment.

3. Whether or not the "reasonableness" standard of the Fourth Amendment could be satisfied without a warrant, a wiretap had to comply with other precedural norms to avoid being an unconstitutional general search.

---

6 The footnote reads: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented in this case." 389 U.S. at 359, n.23.

4. The only exception to the warrant requirement—if it existed—was in the investigation of "spies and saboteurs."

5. The standards required by the Fourth Amendment included: (a) probable cause; (b) limitations on duration; (c) periodic renewals; and (d) minimization to avoid seizing conversations beyond the purpose of the surveillance.

Thus, the Supreme Court precedents in the summer of 1969 nowhere suggested that national security wiretaps were legal if directed indiscriminately against government officials with no access to leaked information or against a working journalist who published that information. Furthermore, there is nothing in the *Keith* opinion that suggests that new law was being written in that case. The Supreme Court in *Keith* reaffirmed certain basic propositions of the Fourth Amendment clearly laid down in *Berger* and *Katz*.

Based on this standard and on this record, the petitioners cannot possibly show their good faith belief in the legality of what they were doing on the ground that the state of the law on reasonableness was unclear at the time. They selected targets on less than probable cause, indeed on less than founded suspicion. There was no jusitification offered as to either Halperin or Smith to justify their selection to victims. The tap stayed on Halperin for 21 months and on Smith for 89 days, long beyond the 60 days condemned in *Berger*. There was no effort to review the taps on a periodic basis. No effort on minimization was made, indeed the taps were utilized to obtain personal and political information totally unrelated to national security.

These actions by petitioners were unreasonable as a matter of law in 1969. At the least, the petitioners have not shown at this stage that they had a good faith belief in their legality and that such a belief was reasonable. Thus, apart from the warrant question, the petitioners cannot succeed on the "objective" part of the good faith defense. They cannot show that the state of the law on the Fourth Amendment reasonableness requirements was unclear at the time they acted.

B. The Petitioners' Conduct Violated Important and Well-Established First Amendment Rights

The Court of Appeals found that respondents' First Amendment rights were implicated by the wiretap on their home telephone. See 606 F.2d at 1199; see also *Smith* v. *Nixon,* 606 F.2d at 1189. This position is fully supported by this Court's decision in *Keith* where it said, "national security cases . . . often reflect a convergence of First Amendment values . . . though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech, ... *The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'* " 407 U.S. at 313-14. (emphasis added).

Thus the wiretap on the Halperin family which intercepted their private political conversations—including Morton Halperin's conversations relating to Senator Muskie's candidacy and to the Clark Clifford article—violated important First Amendment rights. Those conversations were intercepted by design and with the purpose and effect of discovering Halperin's political views, associations and activities, though privately expressed. Whether the interceptions are viewed as "unreasonable" under the Fourth Amendment because of their seizure of political views and associations or whether an independent First Amendment violation is stated, the result is the same: the actions by those government officials responsible constitute a constitutional tort under *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971).

The seizure of these political conversations has two important legal consequences: (1) it undermines the claim that the surveillance was an unblemished national security wiretap; (2) it shows that the participants could not have had a reasonable belief in the legality of what they were doing.

In 1969 this Court had already declared that governmental intrusion into private political views, expressions or associations violated the First Amendment. In *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960) this Court struck down an Arkansas law which

compelled a candidate for a teaching position to reveal all his or her organizational associations. "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." In *Bates* v. *Little Rock,* 361 U.S. 516 (1960) this Court invalidated an Arkansas ordinance that required all organizations to disclose the names of its members. In *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 462 (1958) this Court declared that "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's association. . . . Inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs." Before the government can discover associational information of any person, it must show a "compelling and subordinating governmental interest," *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539, 557 (1963).

In the face of these pronouncements, which were clearly established by the late 1960's, the petitioners intruded into the respondents political and associational ties in the most complete and overreaching manner. Furthermore, they did so surreptitiously without giving respondents a chance to protest or resist. They could not possibly have held a good faith belief in the legality of discovering, reporting on and using Morton Halperin's political views and associational ties. On this score alone, the petitioners' claim of qualified immunity must fail.

C. The Wiretap Program Was Illegal Because of the Surveillance of Working Journalists.

The petitioners assert both in this case and in *Nixon* v. *Smith* that the wiretap program was a proper national security surveillance and that they are entitled to qualified immunity as a matter of law because of their belief in the legality of what they were doing. They claim immunity from damages for wiretapping the journalists who allegedly printed the leaked information as well

as Halperin and the other governmental employees who were suspected of leaking it. According to their argument merely an assertion that national security was involved permitted them to install the wiretap on the journalists allegedly involved.

This is not the law now nor was it the law in 1969. It is obvious that the wiretapping of a journalist involves the most widespread and wholesale discovery of confidential sources. It is far more sweeping that a grand jury subpoena to a journalist to ask him the source of a particular story, *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) or a search warrant of a newspaper office, *Zurcher* v. *Stanford Daily,* 436 U.S. 547 (1978) or subpoena of a journalist's telephone toll records. *Reporter's Committee for Freedom of the Press* v. *AT&T,* 593 F.2d 1030 (1978), cert. denied, 440 U.S. 949 (1979). As the Court of Appeals said in *Smith* v. *Nixon,* 606 F.2d at 1189, n. 34: "Compared to a review of billing records, the wiretapping program in this case is a much more intrusive invasion of any citizens rights and a greater restriction on a journalist's professional freedom."

Yet the importance of giving some protection to confidential sources has been recognized in each of these less intrusive situations. In *Branzburg,* it was stated that a grand jury subpoena did not require "the press to publish its sources of information or indiscriminately to disclose them on request." 408 U.S. at 682 (plurality opinion). This is precisely the effect of a wholesale wiretap. Justice Powell in his concurring opinion noted that a journalist would not have to implicate "confidential source relationships" if there is no "legitimate need of law enforcement." 408 U.S. at 710 (Powell, J., concurring). See also *Saxbe* v. *Washington Post,* 417 U.S. 843, 859 (1974): ". . . we recognized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful." (Powell, J., dissenting). Justice Brennan has recently explained in *In re Roche,* 49 U.S.L.W. 3017 (July 23, 1980) (in chambers)

> "At the same time, there is support for the proposition that the First Amendment interposes a threshold barrier to the subpoena of confidential information and work product

> from a newsgatherer. Four dissenting Justices in Branzburg discerned at least some protection in the First Amendment gathering, 408 U.S., at 721 (Douglas, J., dissenting); 408 U.S. at 744-747 (Stewart, J., dissenting, joined by Brennan and Marshall, JJ.). And Mr. Justice Powell, who joined the Court in Branzburg, wrote separately to emphasize that requests for reporter's documents should be carefully weighed with due deference to the 'vital constitutional and societal interests' at stake. 408 U.S. at 710. Consequently, I do not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds.

The Justice Department has issued detailed regulations relating to the subpoena of reporters, 28 C.F.R. § 50.10, requiring federal law enforcement officers to make all reasonable attempts to obtain information from nonmedia sources, to negotiate with the media and to seek express authorization from the Attorney General before a subpoena is issued. In addition there must be reasonable grounds to believe that the media member has essential information.

As far as search warrants are concerned, this Court in *Zurcher* noted that

> a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment . . . when he weighs such factors. 436 U.S. at 520.

Congress has now passed legislation to protect journalists from direct use of a search warrant, except in certain situations, Privacy Protection Act of 1980, P.L. 96-440, (October 13, 1980). Even in the telephone records case, the Court of Appeals held that claims of bad faith use of a subpoena states a valid cause of action on behalf of the reporters involved, *Reporters Committee, supra,* 593 F.2d at 1064.

When a reporter is wiretapped directly none of these protections exist. Every one of his sources, and exactly what they say, is disclosed to the government. He has no opportunity to challenge the government's right to this information since he does not

know it is being taken. Such a surveillance is among the worst invasions or intrusions into a journalist's activities known to the law.

Furthermore, the government's justification for the intrusion here is far less than has been accepted in the other situations. As a general proposition, the wiretapping of a journalist's home telephone is not likely to discover the person who leaked a newsstory. The Church Committee Staff Report commented:

> The wiretapping of journalists in the investigation of leaks, however, has proven to be a fruitless enterprise. As former Secretary of State Dean Rusk stated:
>
> 'Tapping newsmen will not stop leaks and for the most part is not even going to uncover leaks. There are so many different ways in which leaks can be made and from so many different quarters that there is no way to get at the business of leaks and on sheer practical grounds this is rather foolish policy to pursue.'
>
> Aside from matters of practicality, the Constitution gives special protection to 'freedom of the press.' The precedent set by wiretapping newsmen inevitably leads to undermine the constitutional guarantee of a free and independent press.
>
> Book III, 340

The so-called foreign intelligence exception formerly found in 18 U.S.C. § 2511(3) cannot possibly be stretched to justify wiretaps on journalists simply because of a suspicion that information—classified or otherwise—was leaked to the press and published and thereby made available to a foreign power. In this context as well the government's "bland assurance" that national security was at stake cannot be accepted at face value.

At a minimum, the First Amendment requires that the specific justification for wiretapping a journalist be examined critically and in detail. In this case the petitioners claim that leaks occurred on strategic arms limitations talks, peace proposals for the

Middle East, the war in Vietnam and "the return of the island of Okinawa to Japanese control." (Petitioners Brief at 1). It is uncontradicted that Hedrick Smith had no involvement in any of the stories except for the Okinawa reversion. (See *Nixon* v. *Smith,* No. 79-892, Petition for Writ of Certiorari at 6). In this situation it cannot be said that the government is properly applying the national security concept. If a story about our negotiations with our Japanese ally over return of Okinawa justifies a three month wiretap on a working journalist on national security grounds, then that term has lost its meaning. See *United States* v. *Ehrlichman,* 376 F. Supp. 29 (D.D.C. 1974), aff'd 546 F.2d 910 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977). The range of reporting to which the government tries to apply its theory would make scores of journalists writing on foreign or diplomatic affairs proper targets if they reported anything more than official government handouts. That is not what the First Amendment means. See *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 13-14 (1978) (Burger, C.J.).

Furthermore, the law in 1969 recognized the journalist's right to protect his sources from unwarranted disclosure. At least as early as *Garland* v. *Torre,* 259 F.2d 545, 549 (2d Cir. 1958), it had been recognized that compulsory process could not be used "to force a wholesale disclosure of a newspaper's confidential sources of news." This is precisely what a wiretap of a journalist would produce. Justice (then Judge) Stewart indicated the relationship between the journalist privilege being asserted and the First Amendment right to resist disclosure of associational ties. He wrote:

> It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. Cf. National Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson, 1958, 357 U.S. 449, 464-465, 78 S.Ct. 1163, 2 L.Ed. 2d 1488. The question asked of the appellant went to

> the heart of the plaintiff's claim. We hold that the Constitution conferred no right to refuse an answer.
>
> 259 F.2d at 549-550

See also *Baker* v. *F. & F. Investment,* 470 F.2d 228 (2d Cir. 1972); *Riley* v. *City of Chester,* 612 F.2d 708, 715 (3d Cir. 1979) ("journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."); *United States* v. *Cuthbertson,* 6 Med. L. Rptr. 1545 (3d Cir. July 23, 1980).

Thus in 1969 petitioners should have known that they were violating established law against wholesale intrusion into journalists' confidential sources. By installing a wiretap for 89 days on Hedrick Smith, they engaged in the most sweeping invasion of his sources. They cannot now claim that they thought their acts were lawful.

Nor can they claim that there was an established practice of wiretapping newsmen upon which they relied. Whatever the background or history of the thirty years of national security wiretaps before 1969 they had not been used to any degree for the purpose of wholesale and sweeping wiretapping of journalists.[7]

Furthermore the Smiths have alleged that petitioners installed the wiretap in bad faith, a claim that must be accepted as true at this stage of the proceedings. *Walker Process Equip. Inc.* v. *Food Machinery and Chemical Corp.,* 382 U.S. 172, 174-75 (1965).

---

7 The Church Committee (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) reported two prior cases of working journalists being wiretapped for publishing classified information. One journalist was wiretapped for seven days in 1961 and another for 33 days in 1962. *See* Senate Select Comm. to Study Governmental Operations, *Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans—Final Report, Book III,* S. Rep. No. 94-755, 94th Cong., 2d Sess. at 323 ("Warrantless FBI Electronic Surveillance") (1976).

CONCLUSION

For the reasons stated above, *amici* respectfully requests that this court affirm the judgment of the Court of Appeals below.

Respectfully submitted,

LEON FRIEDMAN
Hofstra University School of Law
Hempstead, N.Y. 11550

FLOYD ABRAMS
GERALD J. BROWN
CAHILL GORDON & REINDEL
80 Pine Street
New York, N.Y. 10005

JAMES C. GOODALE
DEBEVOISE, PLIMPTON, LYONS & GATES
299 Park Avenue
New York, N.Y. 10022

KATHARINE P. DARROW
BRENDA BAKER
THE NEW YORK TIMES
229 West 43rd Street
New York, N.Y. 10036

Attorneys for Amici